Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SLEEPER FARMS, VAUGHN SLEEPER, AND MARY SLEEPER,

Petitioners,

v.

AGWAY, INC., RICHARD SIROIS, TODD BRADLEY, AND CARL SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The defendants below, Respondents here, were "in default" on an arbitration clause they drafted and imposed on the plaintiffs below, Petitioners here; nevertheless the question of arbitrability was referred to the arbitrator to decide. Thus, the questions presented in this petition are:

1. Does a court or an arbitrator decide whether a party "in default" on an arbitration clause may compel arbitration?

2. May a party "in default" on the arbitration clause compel arbitration?

PARTIES TO THE PROCEEDING

The following plaintiffs, Petitioners here, asserted claims in the trial court:

Sleeper Farms
Vaughn Sleeper
Mary Sleeper

The following individuals were defendants in the trial court:

Agway, Inc.
Richard Sirois
Todd Bradley
Carl Smith

Kenneth Wiles and Dennis LaHood were originally named as defendants but later dismissed by stipulation.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioners affirm that they have no parent company and are not a publicly-owned company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit is reported at ___ F.3d ___ and reprinted at App. 1. The opinions of the District Court relevant to this appeal are reprinted at App. 13 and App. 28 respectively. The July 1, 2002, opinion of the District Court, reprinted at App. 13, is reported at 211 F. Supp. 2d 197.

JURISDICTION

The First Circuit issued its opinion in this case on November 2, 2007. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3 of the Federal Arbitration Act is relevant to the disposition of this case. That section reads as follows in its entirety:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an

> agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

INTRODUCTION

This case questions the fundamental roles of courts and arbitrators under the Federal Arbitration Act (FAA). The first question asks "who decides who decides, a judge or an arbitrator?" In the context of this case, the precise question is whether it is for a judge or an arbitrator to decide if a party "in default" on an arbitration clause may compel arbitration. See 9 U.S.C. § 3. The second question naturally flows from the first. It is whether a party "in default" on the arbitration clause may compel an unwilling party to arbitrate a case.

This Court is no stranger to the "who decides who decides" question. The question was considered at least as early as 1967 in *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395 (1967), addressed again in 2002 in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), then examined most recently in

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). Those cases focused on whether the court or an arbitrator decides whether a defense to the underlying contract is a reason to defeat arbitration, *Prima Paint*, whether the fact that the underlying contract is illegal and even criminal is a defense to arbitrability that the court addresses, *Cardegna*, and whether an arbitrator or a court decides whether arbitration is initiated in a timely manner, *Howsam*. Thus, the Court has not directly considered the effect of a default on the terms of the arbitration clause on the ability of the defaulting party to compel arbitration of a dispute. This reality is odd given that section 3 of the FAA specifically conditions the ability of a federal district court to compel arbitration on a finding that "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

This void in the jurisprudence, as will be seen below, has caused confusion and conflicting precedents among the courts. This confusion and conflict has been compounded by language from this Court's opinion in *Howsam* indicating that questions of "waiver" are to be decided by arbitrators not courts. *Howsam*, 537 U.S. at 84. Equating waiver with default, courts have split on whether courts or arbitrators must decide the arbitrability question. In reality, even though the questions presented have never been answered directly by this Court, a correct reading of both *Prima Paint* and *Cardegna* compels a conclusion that courts, not arbitrators, are "who

decides." Thus, not only is there a split of authority, but that split is not countenanced by this Court's precedents.

Perhaps it is the confusion over "who decides who decides" that has led to further confusion over the effect of a default on the defaulting party's ability to compel arbitration. The First Circuit did not recognize the importance of the default *on the terms of the arbitration clause* and simply considered it a question going to the merits of the dispute. On the other hand, the Mississippi Supreme Court recognized that a "default" on the terms of the clause, as opposed to the terms of the contract as a whole, removes the ability of the defaulting party to compel arbitration. *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828 (Miss. 2003). Once again layered over this question is the reality that section 3 requires a finding that "the applicant for the stay is not in default in proceeding with such arbitration."

This case squarely and concisely presents these questions. Respondents (hereafter referred to as Agway) drafted an arbitration clause that provided arbitration as "the sole remedy for resolution of any and all disagreements or disputes." Nevertheless, Agway breached, or "defaulted" on, this clause by exercising a self-help remedy. Thus, Agway was "in default in proceeding with such arbitration."

This Court should issue the writ and take this opportunity to clarify the questions presented here. The issues are clearly and concisely presented. No

extraneous or collateral issues entangle the case. The facts are clear and not in dispute. This case presents an opportunity to harmonize the precedents and further clarify the roles of courts and arbitrators, and to eliminate confusion over the effect of a default on the ability of a party to compel arbitration.

STATEMENT OF THE CASE

A. Factual Background.

In 1998, Vaughn and Mary Sleeper bought Vaughn's father's seed-potato farm in Sherman Mills Maine. The Sleepers grew "seed" potatoes that other farmers would plant and grow potatoes for sale to consumers. Agway, Inc. purchased the seed potatoes from the Sleepers for distribution to potato growers.

The arrangement between the Sleepers and Agway was not terribly complicated. Agway's representatives (either Mr. Sirois or Mr. Bradley depending on the time frame) would negotiate with the Sleepers at the beginning of the planting season to plant certain quantities of seed potatoes in exchange for Agway's promise to buy them. When the Sleepers harvested the potatoes, Agway sent purchase orders for the crop which the Sleepers signed, then the Sleepers shipped the seed potatoes to the growers for planting.

The purchase orders incorporated Agway's standard sales contract. That contract contained an

arbitration clause. Of course, that clause and its terms are critical to this case. It reads as follows:

> The parties to this Contract agree that the sole remedy for resolution of any and all disagreements and disputes arising under this Contract shall be through arbitration in accordance with the rules of the American Arbitration Association, Syracuse, New York. The decision and award determined through such arbitration shall be final and binding upon the buyer and seller. Judgment upon the arbitration award may be entered and enforced in any court having jurisdiction thereof.

The arrangement did not go well. Disputes arose between the Sleepers and Agway over price and purchase quantity. These disputes came to a head when a potato grower complained of a certain shipment. According to Mr. Sleeper, Agway attempted to force him to make a false insurance claim on the shipment, which he refused to do, then threatened to cease doing business with the Sleepers. Ultimately, Agway chose to undertake a "self-help" remedy and withheld over $51,000 owed to the Sleepers rather than seeking to arbitrate the dispute. The Sleepers threatened to sue. Indeed, the Sleepers presented Agway with a draft copy of the complaint they intended to file if the dispute could not be resolved amicably. Agway eventually filed a demand for arbitration, and the Sleepers filed this lawsuit.

B. Proceedings Below.

On January 31, 2002, Agway filed a demand for arbitration with the American Arbitration Association (AAA) essentially seeking a declaration that the self-help remedy they undertook was appropriate. The claim also sought to arbitrate all claims set forth in the Sleeper's draft complaint. The Sleepers objected to the demand and then filed their complaint on February 21, 2002, in the District Court for the District of Maine. The complaint alleged misrepresentation, breach of contract, unjust enrichment, and *quatum meruit*, along with violations of the Maine Anti-Trust Act, the Maine Potato Licensing Act, the Perishable Agricultural Commodities Act and duties to deal fairly and in good faith. The Sleepers also moved to stay the arbitration. Agway moved to stay the Sleeper's complaint and compel arbitration under section 3 of the FAA. App. 3.

Following an evidentiary hearing, the District Court stayed the case and compelled arbitration. Although the Sleepers raised the issue of default by way of the self-help remedy, the district court did not address it. It also did not include this question within the questions left to the arbitrator regarding the scope of the clause. App. 25. The district court likewise failed to address the issue when the Sleepers challenged the arbitration award in 2006. App. 28-37.

As noted, the case was compelled to arbitration. In the interim, however, Agway filed for bankruptcy. In order to move the case forward, the parties

stipulated that "all issues of liability and damages" would be heard by an arbitrator. App 5. As the First Circuit correctly held, this stipulation did not waive the Sleeper's arguments that the case never should have been compelled to arbitration. App. 6.

The arbitrator ruled in favor of the Sleepers on Agway's contention that it rightfully withheld over $51,000 by way of its self-help remedy. In most other respects, the arbitrator rejected their claims. The district court then affirmed the award. App. 36.

The Sleepers appealed to the First Circuit. Here, for the first time, the Sleeper's argument that Agway's decision to seek a self-help remedy amounted to a waiver of the arbitration clause was addressed. As an initial matter, the First Circuit cited *Howsam* and held that this claim was a "procedural" question, and thus in the "category of issues for the arbitrator." App. 9. According to the First Circuit, the argument also amounted to a "breach of the substantive contract" which "is not a permitted objection to arbitrability; it is a merits question, one that the arbitrator considered and based on which even awarded damages to the Sleepers." App. 10.

However, even if the question were to be reviewed, according to the First Circuit the invocation of the self-help remedy would not "state a genuine challenge to arbitrability." App. 9. It referred to the argument as "utterly empty: nothing in the agreement or incorporated AAA arbitration rules suggests that engaging in self-help waives arbitration rights."

App. 10. The First Circuit then affirmed the District Court.

REASONS FOR GRANTING THE PETITION

The First Circuit's opinion highlights the marked confusion courts express over the lines to be drawn between decisions for courts and decisions for arbitrators as to arbitrability. In reality, the analytical tools for answering the question in this case were created by this Court's decisions in *Prima Paint* and *Cardegna*. The most compelling of those tools is a straightforward application of section 3 of the FAA that places the decision in the hands of the court. Thus, the First Circuit's opinion conflicts with decisions of this Court and the language of the FAA. This Court should grant review in order to resolve that conflict. S. Ct. Rule 10(c).

Language in this Court's opinion in *Howsam* has generated significant conflicting authority over whether a court or an arbitrator decides questions of waiver. Some courts leave all waiver questions to the arbitrator. Others carve out some waiver issues for courts and send others to arbitrators. This Court should take this opportunity to resolve these conflicting precedents, particularly in light of the fact that the FAA itself appears to place the issue of "default" in the hands of the courts not arbitrators. S. Ct. Rule 10(a).

The First Circuit's opinion also highlights confusion over the effect of a breach of the arbitration clause itself as opposed to a breach of the underlying contract. The First Circuit equated the breach, or default, on the arbitration clause with questions concerning the merits of the case. It failed to see that under section 3 of the FAA and this Court's precedents, that default had other relevance; it foreclosed Agway's ability to compel arbitration. Other courts have recognized the importance of a default on the arbitration clause itself and have refused to compel arbitration. This Court should grant review in this case to resolve this unsettled issue. S. Ct. Rule 10(a).

Finally, these issues are presented clearly and in a straightforward manner by this case. No extraneous or collateral questions mire the case. This Court should take this opportunity to address these important issues in this clear case. Each of these points is examined in greater detail below.

I. THE DECISION BELOW THAT AN ARBITRATOR DECIDES WHETHER A PARTY IN DEFAULT MAY COMPEL ARBITRATION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND THE CLEAR LANGUAGE OF THE FAA.

This Court, as noted, has taken other opportunities to address the "who decides who decides" question. The FAA itself also gives guidance on this question. Thus, a significant and reasoned body of

law informs this question, and the First Circuit's opinion conflicts with that body of law.

One must start with the words of the statute. Section 3 of the FAA sets forth when a federal district court may (or must) compel arbitration in a case. The statute contemplates three conditions precedent: an arbitration agreement in writing, satisfaction that the issue involved is referable to arbitration under the agreement, and a conclusion that "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. Notably, these conditions precedent are addressed to the court, not to an arbitrator. Thus, a logical reading of the statute is that where any of these conditions is challenged, the court must decide whether they have been met. The First Circuit did not recognize this reality.

Prima Paint is the necessary next step in the analysis. There, this Court held that a defense to compelling arbitration that amounted to a claim of fraud in the inducement of the underlying contract was not a question to be heard by the court, but was for the arbitrator. This conclusion announced three principles that are important to this case and demonstrate the conflict in the First Circuit's reasoning. The first is that the arbitration clause itself is severable from the underlying contract and must be considered alone. The second is that the roles of courts and arbitrators are set out by Congress in sections 3 and 4 of the FAA and that those roles will be respected. *Prima Paint*, 388 U.S. at 403-04. In *Prima Paint* that meant that courts were only to satisfy themselves of

the "making of the agreement to arbitrate" and not to address issues bearing on the contract as a whole. *Id.* at 403. Finally, the Court noted that challenges to the arbitration clause alone were to be addressed by courts and were not to be referred to arbitrators. *Id.* at 404.

Cardegna continued the reasoning established in *Prima Paint*. The issue there was whether arbitration could be defeated when the underlying contract containing the clause is illegal or void. This Court held that the question was for the arbitrator to decide. The basis for this decision was the principles announced in *Prima Paint*: that the arbitration clause is severable from the remainder of the contract and that only challenges to the arbitration clause itself are to be considered by the courts. *Cardegna*, 546 U.S. 440 (2006).

The First Circuit's opinion conflicts with these principles. Once again, the holding there was that the Sleeper's claim of breach *of the arbitration clause* was a substantive issue for the arbitrator. This holding fails to recognize the three principles *Prima Paint* and *Cardegna* so firmly establish. How? The First Circuit did not recognize that section 3 of the FAA requires *the court* to be satisfied that the party seeking to compel arbitration was "not in default." In so doing, the First Circuit also failed to recognize what *Prima Paint* made clear: that sections 3 and 4 of the FAA establish the roles of courts and arbitrators. Finally, it did not recognize that the challenge lodged by the Sleepers was to the arbitration clause, which is

severable from the underlying contract, and was not a challenge to the underlying contract. This breach, according to this Court's precedents, is to be addressed by the courts. Review of the First Circuit's decision is necessary to rectify this conflict with this Court's decisions and the FAA.

II. THE DECISION BELOW DECIDES IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH OTHER UNITED STATES COURTS OF APPEALS AND STATE COURTS OF LAST RESORT.

A. A split of authority exists as to whether waiver by default is to be decided by the court or an arbitrator.

Howsam, this Court's third decision regarding "who decides who decides," has actually generated conflict in the circuits and state courts of last resort. The question in that case was whether a court or an arbitrator would decide whether arbitration was initiated within the time set forth by the applicable arbitration rules. This Court held that the question was one for the arbitrator because it was a "procedural question" that the parties to an agreement would more likely intend for an arbitrator to decide. *Howsam*, 537 U.S. at 83-85, 86. This Court also noted that arbitrators were likely to be "more expert" in applying the rule. *Id.* at 85.

The confusion generated by *Howsam* stems from language quoting another opinion of this Court,

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983). Specifically, this Court wrote "So, too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Howsam*, 537 U.S. at 84 (quoting *Moses H. Cone*, 460 U.S. at 24-25). Precisely what this Court meant with this language and precisely how far it goes is unsettled and conflicting. In this case, the First Circuit relied on this language to hold that the Sleeper's "waiver" or "default" defense to the arbitration clause was not for the courts to decide.

Interestingly enough, the first place to look to see the conflict and confusion is the First Circuit's own opinions. As noted, this case holds that waiver is an issue for the arbitrator. However, a previous opinion from that same circuit holds the precise opposite. In *Marie v. Allied Mortgage Corp.*, 402 F.3d 1 (1st Cir. 2005), the First Circuit examined whether an employer's failure to request arbitration of a Title VII claim during the pendency of the EEOC investigation was a waiver of the right to arbitrate. A preliminary question was who would decide the issue, the court or an arbitrator. The First Circuit held that the question was for the arbitrator.

How the First Circuit reached its decision is as important for this case as the decision itself. The first step in its analysis was to note that "textually under the FAA, a court is only permitted to stay a court action pending arbitration if 'the applicant for the stay is not in *default* in proceeding with such arbitration.' 9 U.S.C. § 3 (emphasis added). A 'default' has

generally been viewed by courts as including a waiver." *Marie*, 402 F.3d at 12-13. The opinion went on to note that the language of section 3 "would seem to place a statutory command on courts" to decide the waiver issue. *Id.* at 13. Sending waiver claims to arbitrators in light of this language, the comparative expertise of courts and arbitrators with respect to waiver claims of this sort, and the inefficiency in sending such claims to arbitrators counseled the First Circuit to allow courts to decide the question. Yet, it did not do so in the Sleeper's case.

The Third Circuit followed the reasoning of the First Circuit in *Marie* and held that waiver, at least waiver by litigation activity, is a question for courts not arbitrators even in the face of *Howsam*. *Ehleiter v. Grapetree*, 482 F.3d 207 (3rd Cir. 2007). *Marie* has also been explicitly followed by the Supreme Court of Alabama. *Ocwen Loan Servicing, LLC v. Washington*, 939 So.2d 6 (Ala. 2006). The Eighth Circuit stands in clear conflict with these opinions. That circuit holds that all claims of waiver are for the arbitrator to decide. *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003); *Pro Tech Industries, Inc. v. URS Corp.*, 377 F.3d 868 (8th Cir. 2004).

Any notion that this split is centered on waiver due to litigation activity should be put aside. First, there was no "litigation activity" in *Marie*. The issue was whether failure to demand arbitration when there was a complaint before the EEOC amounted to

a "default." An EEOC investigation simply is not litigation activity.

Second, both *Marie* and *Ehleiter* examined the role of the courts in light of both *Howsam* and section 3 of the FAA. Both courts concluded that questions of "waiver by default" were for the courts to decide because the FAA so mandated. Undertaking "litigation activity" is, essentially, a "default" on the arbitration clause, thus there is no reasoned and logical difference between "litigation activity" and any other "default." The Eighth Circuit has not recognized this point, and the First Circuit did not see it in this case.

Any such notion completely disappears when the state-court precedents are considered. Specifically, in *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828 (Miss. 2003), the Mississippi Supreme Court explicitly held that courts not arbitrators decide whether a breach of the arbitration clause waived the right to arbitration. *Id.* at 836 n.4. The "default" there was the failure and refusal of Sanderson Farms to pay its portion of the arbitration fees as required by the arbitration clause. It had nothing to do with "litigation activity."

At minimum, the First Circuit's opinion conflicts with *Sanderson Farms*. More realistically, it conflicts with *Sanderson Farms*, *Ehleiter*, and its own opinion in *Marie*. In any event, the confusion stemming from *Howsam* is apparent. This question is at the heart of so many cases. This Court should take this opportunity to resolve the conflict and confusion and more

clearly define the roles of courts and arbitrators where "default" on the arbitration clause is at issue.

B. A split of authority exists as to whether a party in default may compel arbitration.

Less may be written here. The First Circuit's opinion in this case and the Mississippi Supreme Court's opinion in *Sanderson Farms* are clearly in conflict. The Mississippi Supreme Court held that breach of, or "default" on, the arbitration clause amounted to a waiver of the right to arbitrate. *Sanderson Farms*, 848 So.2d at 838. In contrast, the First Circuit held that the Sleeper's argument that Agway's breach of, or "default" on, the arbitration clause waived its right to arbitration was "utterly empty: nothing in the agreement or incorporated AAA arbitration rules suggests that engaging in self-help waives arbitration rights." App. 10.

The First Circuit simply failed to see what the Mississippi Supreme Court found dispositive. Section 3 of the FAA only allows a court to compel arbitration when the party seeking that relief "is not in default in proceeding with such arbitration." Agway's clause required it to utilize arbitration as "the sole remedy for resolution of any and all disagreements and disputes arising under" its contract with the Sleepers. When it exercised a self-help remedy, it did not simply breach the underlying sales contract. It defaulted "in proceeding with [the] arbitration" and thereby

precluded the district court from compelling the case to arbitration. This Court should take this opportunity to address this important issue. The conflicts are firm, and the need for resolution and clarity is significant.

III. THE ISSUES HERE ARE IMPORTANT AND ARE PRESENTED CLEARLY BY THE CASE.

Little could be more important to litigants than the answer to the fundamental question of who will decide their disputes. This case comes to the Court with startling clarity on the primary issues and facts. No one will dispute that Agway chose to employ a self-help remedy before it sought arbitration. Other collateral issues do not entangle this case. Before the Court are the pure questions of whether that undisputed act was a "default" on the contract for arbitration that precludes a district court from compelling arbitration under section 3 of the FAA, and, more fundamentally, "who decides who decides" that question. The Court should take this opportunity to decide these vital questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 30, 2008

United States Court of Appeals
For the First Circuit

No. 06-2694

SLEEPER FARMS; VAUGHN SLEEPER;
and MARY SLEEPER,

Plaintiffs, Appellants,

v.

AGWAY, INC., RICHARD SIROIS,
TODD BRADLEY, and CARL SMITH,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MAINE

[Hon. George Z. Singal, U.S. District Judge]

Boudin, Chief Judge,
Selya, Senior Circuit Judge,
and Schwarzer,* Senior District Judge.

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* Of the Northern District of California, sitting by designation.

Nicholas J.K. Mahoney for appellants.

Frederick J. Badger, Jr. with whom Richardson, Whitman, Large and Badger was on brief for appellees.

November 2, 2007

BOUDIN, *Chief Judge.* This case concerns dealings by Agway Inc., an agricultural cooperative, with Vaughn and Mary Sleeper. The Sleepers grew seed potatoes on their farm (Sleeper Farms) in Sherman Mills, Maine, and claim that Agway owes them money for potatoes harvested between 1998 and 2001. The parties have now litigated before a bankruptcy court, an arbitrator, and the federal district court twice; Agway has gone bankrupt; the Sleepers are no longer growing potatoes.

Between 1998 and 2001 (three growing seasons), Agway purchased seed potatoes from Sleeper Farms; Agway would then re-sell the crop to other farmers for new plantings. In June 2000, Agway withheld some $51,000 of payment, saying that the Sleepers had mixed genetically altered potatoes with unaltered potatoes in a shipment. The parties corresponded about the withheld sum but reached no agreement; the Sleepers threatened to sue; Agway then filed a demand for arbitration with the American Arbitration Association ("AAA"), which the AAA accepted.

On February 21, 2002, the Sleepers filed a complaint in the federal district court in Maine against Agway and several individuals associated with that company. The complaint included multiple common law causes of action and also alleged violations of various state and federal statutes; it challenged, in addition to the earlier withholding, other alleged unfair practices by Agway – unilateral cutting of prices, refusal to accept quantities previously ordered, and so on. The Sleepers moved to enjoin the arbitration, and Agway moved to dismiss or stay court proceedings pending arbitration. *See* 9 U.S.C. § 3 (2000).

The district court held an evidentiary hearing on May 15, 2002, after which it denied the motion to enjoin arbitration and instead ordered a stay of judicial proceedings pending arbitration. The court determined that Sleeper Farms assented to a series of purchase orders, which incorporated by reference Agway's standard sales contract, which in turn included an arbitration clause. None of the Sleepers' objections to arbitrability was accepted.

The district judge did not reach the question of scope, *i.e.* which of the Sleepers' claims fell within the arbitration clause; that is generally a question for the judge to decide, *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650-51 (1986), but here he found a "clear and unmistakable" delegation of that

power to the arbitrator[1] and told the arbitrator to decide the scope of the clause and the merits of the claims that *were* within the scope. We do not have jurisdiction over interlocutory orders that stay proceedings pending arbitration, 9 U.S.C. § 16(b)(1), and the Sleepers voluntarily dismissed without prejudice the appeal that they filed after the order was issued.

Shortly after the district court's order, Agway filed for bankruptcy and proceedings slowed; but eventually the bankruptcy court permitted the arbitration to go ahead. In May 2005, the parties signed an additional stipulation, filed with the AAA, that "all issues of liability and damages contained within Sleeper Farm's Complaint . . . shall be determined through arbitration in this forum." The implications of this stipulation are disputed.

On the merits, in an award issued on December 16, 2005, the arbitrator awarded some $82,000 (plus costs) to Sleeper Farms. He found that Agway's withholding of payment in June 2000 had been improper, but rejected most of the Sleepers' other claims. Not satisfied with this limited victory, the Sleepers returned to the district court and moved to

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[1] The arbitration clause referenced the AAA's procedural rules, one of which permits the arbitrator to rule on such questions of scope. The Sleepers do not challenge this finding by the district judge, and so we need not consider whether such a reference meets the "clear and unmistakable" standard. *See Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452 (2003) (plurality opinion).

vacate the award.[2] Agway moved to confirm it. Finding neither fraud nor manifest disregard of law, the court upheld the arbitrator's award.

On appeal, the Sleepers challenge both of the district judge's orders: the 2002 order referring the dispute to the arbitrator, and the 2006 order confirming the arbitrator's award. The former was not appealable on an interlocutory basis, but as with non-final orders generally, it can be challenged along with the final judgment. *Tejidos de Coamo, Inc. v. Int'l Ladies' Garment Workers' Union,* 22 F.3d 8, 11 (1st Cir. 1994). We first consider the challenges to the initial order.

As a threshold matter, Agway points out that the stipulation stated that the Sleepers agreed to have "all issues of liability and damages" resolved through arbitration. It argues that none of the objections to the July 2002 order matter anymore, claiming the stipulation signed by the parties provided an independent basis for the arbitrator's authority. Indeed, as Agway reads the stipulation, the Sleepers abandoned their original objection to the reference.

Agway's position is arguable, but we think that the more reasonable reading of the stipulation favors

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[2] There was some debate over whether the bankruptcy court or the district court was the proper forum for the post-arbitration motions, but the bankruptcy court noted that the district court proceedings had only been stayed, not dismissed, and therefore directed the parties to return there.

the Sleepers. At the arbitration, the parties could have continued to argue about which of the numerous claims made by the Sleepers fell within the arbitration clause – the scope question having been explicitly referred to the arbitrator by the district court. But the claims were intertwined and overlapping and it was efficient for the parties to agree to treat the whole group as within the scope.

The Sleepers' objections to sending the case to the arbitrator and the manner of its sending were of a different order. Those objections involved not the scope of the clause but whether Agway could invoke the arbitration clause at all and whether the reference by the district court properly allowed the arbitrator to consider other, non-scope objections. The Sleepers had reason to preserve such claims for eventual appeal and no obvious motive for abandoning them.

Although the stipulation would have been clearer with an express reservation as to these non-scope objections, the Sleepers did not waive them. We therefore consider the claims, the district court's legal conclusions being open to *de novo* review. *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 9 (1st Cir. 2005). As it turns out, our interpretation of the stipulation does not affect the result: the district court rightly sent the case to the arbitrator and the terms of the reference did not foreclose any of the Sleepers' legitimate objections.

In the district court the Sleepers objected to any reference – saying that they had never agreed to arbitrate and, in the alternative, that the arbitration clause was unenforceable on various grounds. Claims of the former class – for example, that they had never agreed to any arbitration clause – were for the district court. *AT&T Techs.*, 475 U.S. at 648-49. But the district court resolved claims of this type against the Sleepers and they are not pursued on this appeal.

By contrast, various claims of unenforceability were made but on appeal the Sleepers press only two: that the contracts were illegal (or "void ab initio" as they put it) and that Agway waived its right to arbitrate. Correctly, the Sleepers assume that such claims were properly for the arbitrator; their objection here is that the wording of the district court's reference to the arbitrator did not allow the arbitrator to address those claims.

Indeed, the reference did not refer such claims to the arbitrator as objections *to arbitration*. The district judge told the arbitrator to determine (i) the scope of the arbitration clause and (ii) the merits of whichever of the Sleepers' federal claims fell within the clause's scope. But the district court was correct in thus framing the issues. The illegality and waiver arguments present different problems and we address them in that order.

The Sleepers' "void ab initio" argument goes to the validity of the substantive provisions of the contract, *not* to arbitrability. *Buckeye Check Cashing,*

Inc. v. Cardegna, 546 U.S. 440, 445-446 (2006). As a matter of federal law, the arbitration clause is unaffected even if the substance of the contract is otherwise void or voidable. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04 (1967). Without this rule, the merits of a contractual dispute would often have to be adjudicated in court in order to determine whether the dispute is arbitrable.

If the contract was illegal or if Agway's alleged breach excused promised performance by the Sleepers, the Sleepers might then win the arbitration on the merits. But illegality or breach are simply merits issues that affect what performance is due from each side and what remedies should be ordered. Here, the void ab initio claim *was* referred to the arbitrator when the court directed that the arbitrator rule on "the merits of the issues"; and the arbitrator did consider the validity of the contracts under Maine law.

By contrast, a claim of waiver *may* be a genuine challenge to arbitrability. *See Menorah Ins. Co. v. INX Reins. Corp.,* 72 F.3d 218, 221-22 (1st Cir. 1995). But where a party challenges only "procedural" arbitrability, the court under recently consolidated Supreme Court doctrine is to defer to the arbitrator – for example, as to whether contractual time limits have been adhered to, *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84-85 (2002), or prerequisites (such as internal grievance procedures) have been met, *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557 (1964), or laches or estoppel have barred the invocation of

arbitral rights, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Waiver claims fall into this category of threshold issues for the arbitrator, *Howsam*, 537 U.S. at 84; *cf. Marie*, 402 F.3d at 14 (exception for waiver claims based on litigation activity), and the Sleepers are correct that the district court did not instruct the arbitrator to make that threshold determination. But a closer examination of their original "waiver" argument before the district court reveals that, even if sufficiently presented to avoid forfeiture,[3] it did not state a genuine challenge to arbitrability.

Essentially, the waiver claim reflects the Sleepers' position that Agway unilaterally withheld payment due by contract; that such withholding constituted a breach of contract; further, that Agway breached the arbitration clause by taking that self-help measure rather than immediately invoking arbitration to

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[3] The Sleepers' response to Agway's motion to stay the proceedings did make a waiver argument, but it was hidden within a subsection that purports to argue that "Agway's Own Conduct Reveals That The Parties Never Intended To Make the 'Agway Sales Contract' A Basis of their Bargain." The two arguments were conflated throughout, likely contributing to the confusion surrounding the argument and who was to decide it. In their reply brief, the Sleepers now characterize their argument as an "issue of Laches or Estoppel," but the Sleepers did not argue laches or estoppel to the district judge or even in their opening brief in this court, which alone forfeits that claim. *Keeler v. Putnam Fiduciary Trust Co.*, 238 F.3d 5, 10 (1st Cir. 2001).

resolve the dispute; and that the breach or the self-help or both constituted implicit waivers of Agway's right to arbitrate now.

But, as already noted, breach of the substantive contract is not a permitted objection to arbitrability; it is a merits question, one that the arbitrator considered and based on which even awarded damages to the Sleepers. *Cf. Prima Paint,* 388 U.S. at 404. To the extent that the Sleepers claim that Agway breached the *arbitration clause* by resorting to self-help, that is (at least in form) a procedural arbitrability argument – but one that is utterly empty: nothing in the agreement or incorporated AAA arbitration rules suggests that engaging in self-help waives arbitration rights.[4]

The Sleepers might still insist that because this version of their waiver claim was in form a procedural arbitrability objection (albeit one that lacked merit), they were entitled to have the arbitrator rule on it in the first instance. Arguably, a claim so lacking in merit might not need to be referred to arbitration, *cf. Bell v. Hood,* 327 U.S. 678, 682-83 (1946); but in any event *this* waiver claim was not clearly preserved

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[4] Indeed, before the Supreme Court clarified that procedural arbitrability objections should go to the arbitrator, *Howsam,* 537 U.S. at 84-85, courts routinely rejected "waiver" arguments of this sort. *See Local Union No. 721, United Packinghouse v. Needham Packing Co.,* 376 U.S. 247, 251-53 (1964); *Welborn Clinic v. MedQuist, Inc.,* 301 F.3d 634, 637 (7th Cir. 2002); *Morrie Mages & Shirlee Mages Found. v. Thrifty Corp.,* 916 F.2d 402, 404 (7th Cir. 1990); *Southwest Indus. Imp. & Exp., Inc. v. Wilmod Co.,* 524 F.2d 468, 469-70 (5th Cir. 1975).

(note 3, above); and, if it had been referred, the arbitrator would have had to reject it on the merits.

We turn now to the Sleepers' second group of arguments, directed to whether the arbitration award should be vacated. Our review is "exceedingly narrow," *In re Vital Basics Inc.*, 472 F.3d 12, 16 (1st Cir. 2006), and "tightly circumscribed." *Cytyc Corp. v. DEKA Prods. Ltd. P'ship*, 439 F.3d 27, 32 (1st Cir. 2006). A district court may set aside an award only on limited grounds.[5] We review the district court for clear error on factual findings and *de novo* as to legal conclusions. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-49 (1995).

Of the two grounds put forward by the Sleepers for vacating the award, we need only consider one. In their brief, they assert that the arbitrator acted "in manifest disregard of the law," *cf. Prudential-Bache Secs., Inc. v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995), but do not actually make any arguments to support that claim. Instead, they purport to "incorporate[ ] by reference" their motion before the district court. That is not acceptable: this court will only consider arguments made before this court; everything else is deemed forfeited. *United States v. Beltran*, ___ F.3d ___, 2007 U.S. App. LEXIS 22054, at *4 (1st Cir. Sep. 14 2007).

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[5] The Federal Arbitration Act enumerates specific grounds for which an award can be vacated by the district court, 9 U.S.C. § 10(a), and there are limited extra-statutory grounds that could also merit vacatur. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990).

Next, the Sleepers attempt to tar the arbitral award as contrary to public policy – particularly, the policy reflected in the Maine Potato Licensing Act, 7 M.R.S.A. § 1022 (2007). Since the statute is designed (they say) to "protect the potato farmer from the placing of oral planting orders," the Sleepers argue that the arbitrator should not have invoked the statute of frauds to bar any of their claims.

Their theory seems to be that if (as they allege) oral contracts were made despite the statutory requirement of a detailed written record, those contracts should be enforced against the purchasers as a form of penalty notwithstanding the general doctrine that voids such agreements. But a contract can only be enforced if it exists – and the arbitrator found that there were no such oral contracts between Agway and the Sleepers; he invoked the statute of frauds only as an alternative ground of decision.

Even if the Sleepers' argument rested on a sound premise, legal mistakes by the arbitrator are not automatically subject to correction on judicial review, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987), even when they are alleged to touch on public policy. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber,* 461 U.S. 757, 766 (1983) (describing exceptions). Since the premise fails, we need not fine tune the limits on reviewability.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SLEEPER FARMS, et al., Plaintiffs,	)	
v.	)	Docket No. 02-CV-35-B-S
AGWAY, INC., et al., Defendants.	)	

ORDER

SINGAL, District Judge.

A potato grower sued an agricultural cooperative and several of its employees to recover monies allegedly owed under potato purchase contracts. Presently before the Court are Plaintiffs' Motion to Stay/Enjoin Arbitration (Docket #5) and Defendants' Motion to Dismiss or to Stay Proceedings Pending Arbitration (Docket #7). Pursuant to the following discussion, the Court DENIES Plaintiffs' Motion and GRANTS Defendants' Motion.

I. BACKGROUND

Plaintiff Sleeper Farms is a potato farm located in Sherman Mills, Maine. Plaintiffs Vaughn and Mary Sleeper own and operate Sleeper Farms, which they purchased from Vaughn Sleeper's father in May 1998. Defendant Agway is a Delaware corporation specializing in agricultural goods and services, with

its principal place of business in Dewitt, New York. Defendants Richard Sirois, Todd Bradley and Carl Smith are Agway employees.

From 1998 through 2000, Sleeper Farms was a "contract grower" of seed potatoes for Agway. Early each season, Vaughn Sleeper spoke with either Sirois or Bradley, Agway sales representatives, and agreed to plant certain quantities and varieties of seed potato in return for Agway's promise to buy the crop at harvest time. The parties discussed price only rarely, normally leaving the price term open. When Sleeper harvested the potatoes, Agway sent purchase orders signed by a sales representative for specific quantities at specific prices. Sleeper signed and returned the orders, and shipped the potatoes to growers Agway designated. The growers inspected the potatoes and reported to Agway on their quality. Agway then paid Sleeper for the potatoes shipped.

Sleeper received, signed and returned eight purchase orders from Agway between 1998 and 2000. Each order arrived by mail, usually with an enclosure labeled "Agway Sales Contract." The enclosure described various terms and conditions of sale between parties designated "Buyer" and "Seller," and contained an arbitration provision that read:

> The parties to this Contract agree that the sole remedy for resolution of any and all disagreements or disputes arising under this Contract shall be through arbitration in accordance with the rules of the American Arbitration Association, Syracuse, New York.

> The decision and award determined through such arbitration shall be final and binding upon the buyer and seller. Judgment upon the arbitration award may be entered and enforced in any Court having jurisdiction thereof.

At an evidentiary hearing held May 15, 2002, Vaughn Sleeper testified that he does not remember receiving the enclosure with some of the purchase orders he signed and returned, but acknowledged that he was familiar with the document and that he had numerous copies of it at his home. Both parties indicated, moreover, that they understood the Agway Sales Contract to be the document referred to on the purchase orders as the "attached terms and conditions" to which signatories to the purchase orders assented.

Although Sleeper acknowledges signing the purchase orders and returning them to Agway, it contends that the orders did not fulfill the underlying agreement between the parties for each season. Potatoes that Sleeper had planted at the outset of the growing season, on Agway's promise to purchase them, remained unsold after each season's harvest and spoiled. Sleeper also contends that it did not receive agreed-upon prices for some of the potatoes it did sell to Agway, and that it only signed the orders designating the prices because it did not have a choice. Often, the purchase orders arrived after negotiation had begun for the subsequent growing season, effectively forcing Sleeper to accept unfavorable prices in exchange for continued patronage from

Agway. Sleeper also claims that on several occasions, Agway did not pay for potatoes the farm shipped.

In June 2000, Agway withheld payment from Sleeper for shipments of potatoes it claims were not satisfactory. Sleeper protested, and Agway eventually filed a demand for arbitration with the American Arbitration Association. Sleeper responded by filing the suit at bar, alleging a variety of contractual, statutory and common law tort claims against Defendants. Sleeper also immediately moved to stay or enjoin the arbitration (Docket #5). Agway and the individual Defendants moved to dismiss or to stay the district court proceedings pending arbitration (Docket #7).

II. DISCUSSION

The parties' cross-motions in this case require the Court to resolve the seemingly elementary issue of whether Plaintiffs' claims can be arbitrated. The issue implicates two questions: (1) Did the parties enter into an agreement to arbitrate? and (2) If so, did they agree to arbitrate claims such as the ones Plaintiffs raise? The first question addresses the existence of the agreement, whereas the second involves its "scope." Together, these questions are referred to as whether Plaintiffs' claims are "arbitrable." *See PaineWebber Inc. v. Elahi,* 87 F.3d 589, 595 (1st Cir. 1996) (discussing "arbitrability").

The Federal Arbitration Act, 9 U.S.C. §1 et seq. (the "FAA" or the "Act"), which governs the procedure

for submitting disputes to arbitration, guides the Court in resolving "arbitrability" questions.[1] The Act emphasizes that arbitration is fundamentally a contractual matter, and requires courts to honor all agreements to arbitrate except those that are invalid "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The existence of an agreement to arbitrate is paramount. "It is a cardinal principle of federal arbitration law that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Stinson v. America's Home Place, Inc.*, 108 F. Supp. 2d 1278, 1281 (M.D. Ala. 2000) (quoting *AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986)); *see also Elahi*, 87 F.3d at 593 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)); 9 U.S.C. §4 (requiring the court to compel arbitration provided that "the making of [an] agreement [to arbitrate] . . . is not in issue").

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[1] The Act is applicable to this case because the transactions between the parties involved "commerce." The Act defines "commerce," in pertinent part, as "commerce among the several States." 9 U.S.C. §1. Although the contracts at issue in this case were for the purchase and sale of potatoes entirely within Maine, the Act has been interpreted to apply to all contracts "relating to interstate commerce," as those at issue in this case undoubtedly did. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (finding that the FAA reaches "to the limits of Congress' Commerce Clause power").

Once the existence of an agreement is established, courts turn to the question of the "scope" of the arbitration agreement, *unless* the parties have "clearly and unmistakeably" delegated the issue of "scope" to an arbitrator. *AT & T Tech., Inc.,* 475 U.S. at 649; *see also First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995); *Carson v. Giant Food, Inc.,* 175 F.3d 325, 329 (4th Cir. 1999); *General Motors Corp. v. Pamela Equities Corp.,* 146 F.3d 242, 248-49 (5th Cir. 1998). In this case, the arbitration clause provides that arbitration shall proceed according to the rules of the American Arbitration Association. Rule 8 of those rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the . . . scope . . . of the arbitration agreement." *See* Aff. of Adams, ex. B (Docket #4). This is a "clear and unmistakable" delegation of scope-determining authority to an arbitrator. *See Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.,* 203 F.R.D. 677, 685 (S.D. Fla. 2001). Thus, if the Court finds that an agreement to arbitrate exists between the parties, it will leave the second arbitrability question to an arbitrator.

A. Existence and Validity of Agreement to Arbitrate

In deciding whether Plaintiffs and Defendants agreed to arbitrate their disputes, the Court applies state law principles of contract formation. *See First Options,* 514 U.S at 944. Plaintiffs argue that they

never assented to the purchase orders, and even if they did, the purchase orders do not incorporate an arbitration clause. Moreover, they contend that even if the arbitration clause is incorporated into the purchase orders, it is unconscionable or fraudulently induced. Finally, they argue that the purchase orders, themselves, are illegal, unconscionable or fraudulently induced.

Only some of these arguments challenge the existence of the agreement to arbitrate, however. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Supreme Court distinguished between challenges to the *validity* of the contract as a whole, and challenges to the *existence* of the agreement to arbitrate. *Id.* at 403-04; *see also Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159 (5th Cir. 1987) (alleged illegality of contract goes to its validity); *Stinson*, 108 F. Supp. 2d at 1282-83 (collecting cases). The rationale behind *Prima Paint* is that "an arbitration clause is severable from the contract in which it is embedded." *Large v. Conseco Finance Servicing Corp.*, 292 F.3d 49, ___ (1st Cir. 2002) (pagination not yet available). Because it is severable, only challenges to the substance of the clause itself, or to the existence of the contract within which it appears, are pertinent to the issue of the existence of an agreement to arbitrate. *Id.* at ___ (citing *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1137-42 (9th Cir. 1991); *Stinson*, 108 F. Supp. 2d at 1282-83).

Applying this distinction, the Court finds that Plaintiffs' arguments that they did not assent to the purchase orders, that the purchase orders did not incorporate the arbitration clause contained in the so-called "Agway Sales Contract," and that the arbitration clause was unconscionable or fraudulently induced, go to the agreement to arbitrate's existence. By contrast, the arguments that the purchase orders were illegal, unconscionable or fraudulently induced only challenge the validity of the contract as a whole. The Court will only address the former arguments in resolving the first arbitrability question.[2]

1. Did the parties express their mutual assent to the purchase orders?

Plaintiffs contend that they never assented to the purchase orders, and therefore that they are not bound by them. The Court finds this argument to be frivolous. The purchase orders, on their face, are contracts for the sale of seed potatoes. Both parties acknowledge signing them and acting in accordance with them. Indeed, several of Plaintiffs' claims arise

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[2] The question of whether the latter issues should be decided by an arbitrator or the Court implicates the arbitration clause's *scope*. *Compare Tracer Research Corp. v. Nat. Envtl. Servs. Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994) (citing *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983); *with Battaglia v. McKendry*, 233 F.3d 720, 726 (3d Cir. 2000) (rejecting *Tracer*); *H.S. Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 385 (11th Cir. 1996)); *see also McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994).

from Defendants' alleged breach of the obligations described in the purchase orders. In short, there is little doubt that the orders are contracts for the sale of seed potatoes, to which both parties assented. *See VanVoorhees v. Dodge,* 679 A.2d 1077, 1080 (Me. 1996) ("To establish a legally binding agreement the parties must have mutually assented to be bound by all its material terms; the assent must be manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties").

2. Did the purchase orders incorporate the "Agway Sales Contract" by reference?

Plaintiffs argue, however, that even if they assented to the purchase orders, the "Agway Sales Contract" containing the arbitration provision was never validly incorporated into the purchase orders, and therefore an agreement to arbitrate never came into being. They point out that the document was not attached to the purchase orders, that they did not sign it, and that its terms did not reflect the actual relationship between the parties. These arguments are without merit. Whether or not the document was physically attached to the purchase orders is irrelevant. Documents extrinsic to a written contract may be incorporated into it by reference. *See, e.g., Bradstreet v. Rich,* 74 Me. 303 (1883) ("When a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to

were inserted in the contract.") Even if a document referred to in the contract as "attached" is not physically appended to it, the document is nevertheless treated as incorporated provided it is readily available to the contracting parties. *See, e.g., Beedy v. San Mateo Hotel Co.,* 150 P. 810 (Cal. App. 1915) (cited in 17A Am. Jur. 2d Contracts §400 (1991)). That was unquestionably the case here. Plaintiffs acknowledged that they understood the "Agway Sales Contract" to be the "terms and conditions" referred to in the purchase orders, and possessed at least five copies of the document. There could be no mistake that the purchase orders incorporated those terms and conditions. As such, Plaintiffs' signature on the Agway Sales Contract was unnecessary.

Plaintiffs next argue that the provisions of the Agway Sales Contract are unenforceable because they refer to a "Buyer" and "Seller," whereas Defendant Agway acted essentially as a broker, rather than a buyer, in its transactions with Plaintiffs. Plaintiffs reason that this purported mismatch in terms renders the Agway Sales Contract's provisions meaningless. To bolster their argument, Plaintiffs elicited from Defendant Sirois at hearing an admission that Defendant Agway acted as a seed potato "broker," insofar as its business was to purchase seed potatoes from Plaintiffs and, for the most part, sell them to other seed potato growers.

However, the purchase order refers to the parties as "Seller" (meaning Plaintiffs) and "Buyer" (meaning Defendant Agway). The Agway Sales Contract uses

the same terms. Plaintiffs introduced no evidence at hearing suggesting they believed Defendant Agway was anything other than the "Buyer" referred to in the purchase order. Moreover, although Defendant Sirois acknowledged he perceived Defendant Agway's role as that of a "broker," he defined the term as one who purchases from one party and sells to another. In short, the terms "broker" and "buyer" do not appear to be mutually exclusive in this context, and in any case, there was no ambiguity at the time of contracting about who the parties referred to in the Agway Sales Contract actually were. The Agway Sales Contract and the arbitration provision it contained were incorporated by reference into the purchase order contracts.

3. Is the arbitration provision invalid?

Plaintiffs also purport to mount two challenges to the validity of the arbitration clause itself, arguing that it is either unconscionable or fraudulently induced. A clause in a sales contract is unconscionable when:

> in light of the general commercial background and the commercial needs of the particular trade or case, the [clause] involved [is] so one-sided as to be unconscionable under the circumstances existing at the time of the contract . . . The principle is one of the prevention of oppression and unfair surprise, and not of disturbance of allocation of risks because of superior bargaining power.

11 M.R.S.A. §2-302, cmt. 1. Plaintiffs argue that the arbitration clause, itself, is "one-sided." There is little in the clause that supports Plaintiffs' argument. That Plaintiffs may be required to arbitrate their dispute out-of-state is not unconscionable. *Cf. DiMercurio v. Sphere Drake Ins. PLC,* 202 F.3d 71, 81 (1st Cir. 2000) (arbitration clause in insurance contract requiring that all coverage disputes be arbitrated in London, England, not unconscionable). Although it is possible that arbitration fees may be so burdensome as to prevent Plaintiffs from vindicating their rights, it is Plaintiffs' burden to show that arbitration would be "prohibitively expensive." *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 92 (2000). Plaintiffs have failed to do so, and in fact it appears that fees in this case have been waived by the arbitrator. *See* Plaintiffs' Brief, exh. 1 (Docket #23). Finally, the fact that arbitration effectively entails the forfeiture of Plaintiffs' Seventh Amendment right to a trial by jury does not render the clause unconscionable. *See Snowden v. CheckPoint Check Cashing,* 290 F.3d 631, ___ (4th Cir. 2002) (pagination not yet available); *Burden v. Check into Cash of Kentucky, LLC,* 267 F.3d 483, 492 (6th Cir. 2001). Although Plaintiffs attempted to show at an evidentiary hearing held May 15, 2002, that the clause is unconscionable, the evidence showed nothing more than their dissatisfaction with Defendants' bargaining position in negotiating the purchase orders as a whole. This issue goes to the validity of the contract rather than the existence of an agreement to arbitrate, and is for the arbitrator,

not the Court, to decide. *See Prima Paint,* 388 U.S. at 403-04; *Stinson,* 108 F. Supp. 2d at 1282-83.

Finally, Plaintiffs argue that Defendants fraudulently induced them to agree to the purchase orders by promising to purchase and pay for future installments of seed potatoes. Like Plaintiffs' argument regarding unconscionability, however, these arguments do not address the arbitration provision specifically, and are appropriate for an arbitrator. Plaintiffs do not argue that Defendants made specific representations regarding the arbitration provision, itself, that induced them to agree to the purchase orders. *See Prima Paint,* 388 U.S. at 403-04; *Stinson,* 108 F. Supp. 2d at 1282-83.

B. Remaining Issues

Satisfied that the parties entered into an agreement to arbitrate, the Court refers this dispute to an arbitrator to determine: (1) what issues contained in Plaintiffs' Complaint, or raised by Plaintiffs as defenses to the purchase orders, are covered by the arbitration clause; (2) what issues, if any, are not covered by the clause and should remain for the Court to decide; and (3) the merits of the issues that are covered by the clause. The Court will stay its proceedings pending the resolution of those issues. *See, e.g., Elahi,* 87 F.3d at 595.

III. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' Motion to Stay/Enjoin Arbitration. The Court further GRANTS Defendants' Motion to Dismiss/Stay Proceedings and STAYS proceedings before the Court pending arbitration as described above.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 1st day of July, 2002.

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TODD BRADLEY, Individually and as General Manager of Agway Inc defendant	FREDERICK J. BADGER, JR. (See above)
CARL SMITH, Individually and as Director of Agway Inc defendant	FREDERICK J. BADGER, JR. (See above)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SLEEPER FARMS, et al., Plaintiffs,	)	
v.	)	Docket No. 02-CV-35-B-S
AGWAY, INC., et al., Defendants.	)	

ORDER REGARDING ARBITRATION AWARD

Presently before the Court are Plaintiffs' Motion to Vacate the Arbitration Decision (Docket #39) and Defendants' Motion to Confirm Arbitration Award (Docket #56). Both of these motions seek review of the December 16, 2005 Decision of the American Arbitration Association (Ex. A to Docket # 39) (hereinafter, "Arbitration Award"). As explained below, the Court hereby DENIES Plaintiffs' Motion (Docket #39) and GRANTS Defendants' Motion (Docket #56).

I. STANDARD OF REVIEW

"Judicial review of arbitration awards is extremely narrow." *Cytyc Corp. v. DEKA Products Ltd. Partnership,* 439 F.3d 27, 29 (1st Cir. 2006). Pursuant to federal statute, a court may only vacate an arbitration award on one of four specific bases (hereinafter, the "Section 10 bases"):

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). In addition to these express statutory bases for vacating an arbitration award, the First Circuit has also held that an arbitration award may be vacated if it reflects "manifest disregard for the law." *E.g., McCarthy v. Citigroup Global Markets Inc.*, 463 F.3d 87, 91 (1st Cir. 2006). In order to succeed, a challenge based on manifest disregard for the law must show that the arbitration award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact." *Id.* at 91 (citations omitted). In other words, the arbitration record must reflect that the arbitrator knew the law but "willfully" or

"expressly disregarded" that applicable law. *Id.* at 92 (citations omitted).

Unless the Court concludes that an arbitration award reflects a manifest disregard for the law or falls within one of the Section 10 bases, the award will generally be confirmed. *See* 9 U.S.C. § 9. With this standard in mind, the Court proceeds to its review of the arbitration award in this case.

II. BACKGROUND

The Court directs readers interested in a detailed account of the underlying facts to the Court's earlier order in this matter. *See Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 198-200 (D. Me. 2002). Via this July 1, 2002 Order, the Court found that the parties had entered into an agreement that included a valid arbitration provision. Thus, the Court referred the parties' dispute to arbitration specifically requesting that the arbitrator determine: "(1) what issues contained in Plaintiffs' Complaint, or raised by Plaintiffs as defenses to the purchase orders, are covered by the arbitration clause; (2) what issues, if any, are not covered by the clause and should remain for the Court to decide; and (3) the merits of the issues that are covered by the clause." *Id.* at 203.

Subsequent to this ruling but prior to any arbitration occurring, Defendant Agway filed a Notice of Bankruptcy (Docket # 33). Plaintiffs Sleeper Farms, Vaughn Sleeper and Mary Sleeper (together, "Sleepers") then filed a proof of claim in the Agway Chapter

11 case, which was before the Bankruptcy Court in the Northern District of New York. (*See* Ex. 1 to Docket # 42.) On October 21, 2004, the Bankruptcy Court entered a consent order allowing the automatic stay to be lifted with respect to Sleepers for the limited purpose of allowing the arbitration that had been ordered by this Court on July 1, 2002. (*See* Consent Order (Ex. 2 to Docket # 42).) Following this ruling, in May 2005, the parties entered into a stipulation whereby they agreed that "all issues of liability and damages contained within the Sleeper Farm's [sic] Complaint filed in United States District Court for the . . . District of Maine, Docket No. CV-02-35-B-S shall be determined through arbitration in this forum." (Stipulation (Ex. 3 to Docket # 42).)

The arbitration took place in Syracuse, New York on August 23-25, 2006. On December 16, 2005, the arbitrator entered his decision awarding Sleepers $82,459.19 in damages and $20,040.51 in administrative fees. (Arbitration Award at 17.) At the outset, the arbitrator acknowledged that this Court's July 1, 2002 Order requested that the arbitrator resolve which issues were in fact subject to arbitration. (Arbitration Award at 2.) However, because the parties had subsequently stipulated to arbitrate all issues, the Award ultimately addressed all claims and issues.

Following the filing of the Arbitration Award, the parties returned to the Bankruptcy Court. The Trustee moved for approval of the Award. Sleepers, on the other hand, sought leave to challenge the Arbitration

Award before this Court. Ultimately, the Bankruptcy Court determined that "the Maine District Court is the appropriate court to review the Arbitration Decision because it retained jurisdiction over the proceedings before it . . . [and] should review the arbitration proceedings to determine whether the arbitrator complied with its Order." (May 12, 2006 Order (Docket # 52) at 10.) The Bankruptcy Court also noted that "the Maine District Court . . . should determine the effect of the Stipulation and whether the arbitrator ignored the court's [earlier] findings of fact." (*Id.* at 11.) In order to allow this review, the Bankruptcy Court granted Sleepers "nunc pro tunc relief from the injunction imposed upon confirmation of the Debtors' confirmed plan, to the extent they seek to proceed with their motion to vacate the Arbitration Decision" and also denied without prejudice the Trustee's motion seeking approval of the award. (*Id.* at 11-12.) This ruling brought the parties back before this Court.

III. DISCUSSION

Plaintiffs present three separate challenges to the arbitration award. First, Plaintiffs claim to have uncovered new evidence in the form of a March 2000 letter that was produced for the first time in connection with the testimony of Todd Bradley at the arbitration hearing. Plaintiffs claim that the withholding of this document amounted to fraud on the arbitrator. On the record presented, the Court does not believe that the March 2000 letter and the circumstances

surrounding its production provide any basis for vacating the arbitration award. Despite their argument, Plaintiffs are unable to establish fraud by clear and convincing evidence. *See, e.g., Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). Moreover, even if a lower burden were imposed, there is no evidence suggesting that the allegedly belated and fraudulent production was "not discoverable upon the exercise of due diligence . . . during the arbitration." *Id.* Plaintiffs concede, as they must, that they did in fact receive and review this document *during* the arbitration, not *after* the arbitration. Plaintiffs' failure to recognize the now-argued significance of the document until after the arbitration does not meet the standard for finding that the Arbitration Award was procured by fraud.

Next, Plaintiffs argue that the arbitrator exhibited manifest disregard for the law by failing to follow all of the factual findings contained in this Court's July 1, 2002 Order. This argument is without merit. First, the Court believes that the arbitrator's factual findings are consistent with this Court's earlier findings. Second, to the extent there are any differences in the factual findings, the Court finds no basis for concluding that those differences amount to a manifest disregard for the law. *See, e.g., Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 219 (2nd Cir. 2002) (finding that failure to follow and apply the discretionary doctrine of law of the case does not amount to manifest disregard of the law).

Third, Plaintiffs argue that the arbitrator's decision with respect to the Maine Potato Licensing Act ("MPLA"), 7 M.R.S.A. § 1011 *et seq.*, reflects a manifest disregard for the law. Plaintiffs' challenge focuses on the following passage from the Arbitration Award:

> With the exception of the so-called "hold-back" $51,039 which is dealt with under the MPLA section of this Award, the Sleepers claims for this season are disallowed for failure of proof. The so-called seed orders were nothing more than guidelines and were not bindings until the purchase orders were executed in the spring. Even if the seed order were found to be contracts they would not be enforceable because of the Statute of Frauds, UCC § 2-201, 11 M.R.S.A. § 2-201. The Sleepers have not shown that Agway did not purchase everything it committed to purchase. There was a market for the Sleepers' seed potatoes as the Sleepers themselves demonstrated by selling to others than Agway. Thus, UCC § 2-201(3), 11 M.R.S.A. § 2-201(3) is inapplicable.

(Arbitration Award at 10-11.) Notably, this passage is found in the section of the Award that addresses Sleepers' breach of contract claims. Nonetheless, Sleepers apparently fail to recognize this context for the passage and argues that this passage actually reflects the arbitrator's decision to disregard the MPLA. In fact, the arbitrator clearly recognized and applied the MPLA in an earlier section of the Award

expressly devoted to Sleeper's MPLA claims. (*See* Arbitration Award at 5-6.) The arbitrator's MPLA analysis resulted in an award of $51,038.62, plus prejudgment interest, in favor of Sleepers. Having reviewed the entirety of the Arbitration Award, there is no basis for concluding that the award reflects a manifest disregard for the MPLA or that the arbitrator's application of the MPLA somehow violated public policy. Under the Court's reading of the Arbitration Award, the decision not to award Sleepers additional damages under either the MPLA claims or their breach of contract claims rested on Sleepers' failure to meet their burden of proof. This conclusion does not appear to be palpably faulty or otherwise unfounded on the record presented.

In short, the Court has considered all of Plaintiffs' objections in the context of the entire record. In the Court's assessment, none of Plaintiffs' allegations rise to the level of manifest disregard for the law or otherwise meet any of the Section 10 bases for vacating an arbitration award. Likewise, the Court believes that the Arbitration Award complied with the Court's July 1, 2002 Order and the later stipulation entered into by the parties. Therefore, the Court DENIES Plaintiffs' Motion to Vacate (Docket # 39).

Defendants have specifically moved to have the arbitration award confirmed and asked this Court to enter judgment consistent with the Arbitration Award. In response, Plaintiffs argue that the Bankruptcy Court retains jurisdiction over any decision to confirm or approve the arbitration award. Undoubtedly, the

Arbitration Award will require action by the Bankruptcy Court in order to be enforced. However, in light of the Bankruptcy Court's previous rulings regarding this Court's continuing jurisdiction, the Court believes it is appropriate for it to rule upon Defendants' Motion to Confirm Arbitration Award (Docket # 56). Therefore, upon finding that Defendants have met all of the requirements for confirmation laid out in 9 U.S.C. § 9, the Court hereby GRANTS Defendants' Motion to Confirm Arbitration Award (Docket # 56) and CONFIRMS the Award.

IV. CONCLUSION

For the reasons stated herein, the Court hereby DENIES Plaintiffs' Motion (Docket #39) and GRANTS Defendants' Motion (Docket #56). As a result of these rulings, the Clerk is hereby directed to enter judgment in this matter in accordance with the December 16, 2005 Decision of the American Arbitration Association (Ex. A to Docket # 39). The effect of this judgment shall ultimately be determined by the Bankruptcy Court.

SO ORDERED.

George Z. Singal
Chief United States District Judge

Dated this 1st day of November 2006.

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